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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1156

MAYTE C. ROSS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Mayte C. Ross, by her attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on January 23, 1942, affirming an unpublished decision of the United States Board of Tax Appeals.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 1 to 5) is a memorandum opinion and is unpublished. The opinion of the Circuit Court of Appeals (R. 27-29) was promulgated on January 23, 1942 and is reported at 125 F. 2d 767.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 23, 1942 (R. 30). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

The petitioner contended before the United States Board of Tax Appeals that during the years 1935, 1936 and 1937 here involved, she carried on an active and continuous real estate business and that the Commissioner of Internal Revenue erred by disallowing as deductions from gross income the sums paid during these years by her to her general agent and to various realtors, appraisers, accountants and lawyers for services rendered in connection with the petitioner's business. The Board of Tax Appeals affirmed the determination of the Commissioner.

The petitioner urged before the Circuit Court of Appeals that the management of real estate and the buying and selling of real property constitutes the "carrying on of a trade or business" and that the Board of Tax Appeals erred by disregarding specific, competent and relevant testimony showing that the petitioner was engaged in the real estate business. The Circuit Court of Appeals found as a fact that C. Chandler Ross was a general agent for petitioner (R. 28) but affirmed the Board of Tax Appeals on the ground that the petitioner was not engaged in business and did not hold herself out to others as being so engaged (R.

29). Accordingly this petition presents the following questions:

1. Whether the Board of Tax Appeals and the Circuit Court of Appeals erred in disregarding certain specific evidence of the petitioner showing that she was engaged through her general agent in the management of real estate and the buying and selling of real property.

2. Whether the management of real estate and the buying and selling of real property is a business within the meaning of Section 23(a) of the Revenue Acts of 1934 and 1936.

STATUTES INVOLVED.

Revenue Act of 1934, c. 277, sec. 23 (a), 48 Stat. 688.

> "DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:
>
> (a) Expenses.
>
> (1) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered: traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, or property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Section 23(a) of the Revenue Act of 1936 contains the same provisions.

STATEMENT.

The Circuit Court of Appeals found the following facts (R. 27-28):

> "The petitioner is the widow of Henry D. Dechant who died on February 9, 1931. The petitioner married her present husband, C. Chandler Ross on November 7, 1931. When Dechant died he left the petitioner $300,000 in insurance, a life interest in an estate worth approximately $3,000,000, and real estate located in Florida and New Hampshire. In March, 1932 letters were exchanged between the taxpayer and her husband whereby it was agreed that she should pay him $25,000 a year in consideration of his giving up his profession as a portrait painter and devoting all of his time to looking after her financial and business affairs. This agreement was to be in force for five years unless sooner terminated by mutual consent. The agreement was renewed and has continued in effect.
>
> "The petitioner sought to claim as a deduction for 1935, 1936 and 1937 the sum of each year's salary paid to her husband under the agreement referred to. She also claims as deductible items specified legal and accounting expenses incurred in connection with certain trusts. As to these it may be stated that the petitioner was dissatisfied with the activities of William H. Berg, trustee of both trusts and president of Health Products Company, a corporation organized by the petitioner's late husband and from which a large part of her income was derived. As a result of legal proceedings instituted by the petitioner with the aid of Ross and counsel Berg resigned as president and returned certain stock of the corporation theretofore voted to him. *Ross also looked after the taxpayer's real estate* and her investments. *He was in fact a sort of general agent* for her." (Italics supplied.)

Both the Court below and the Board of Tax Appeals disregarded the following facts shown by the unrebutted evidence of petitioner's witnesses:

During the years 1935, 1936 and 1937 the petitioner engaged in substantial and extensive real estate transactions in New York, New Jersey and Florida. (R. 14, 15, 16.)

Among her real estate transactions during the years 1935, 1936 and 1937, carried out by her general agent, Mr. Ross, were the following:

She obtained control of the real property situated on the west side of 178th Street, New York City, by buying out three other interested parties; foreclosed the mortgage on the property and took title (R. 15); she then secured a buyer for the property and sold it for $76,000 (R. 15).

Petitioner secured control of the real property known as 270 Convent Avenue, New York City, acting with the cooperation of the attorney for other parties interested in this property. She then withdrew the property from its rehabilitator (R. 16), entered into sale negotiations and finally sold the property for $155,000 (R. 16).

She secured control of ten parcels of real estate located in Eastern New Jersey, underlying a mortgage certificate having a face value of $75,000 in the Fidelity Union Title & Mortgage Company of New Jersey. After securing control of these properties, the petitioner sold two-thirds of the properties for cash and held the other third of the properties, receiving payments thereon (R. 16). These various transactions involved substantial work and negotiation and not less than $275,000 worth of real estate was acquired and sold by the petitioner (R. 14, 15, 16, 17).

During 1935, 1936 and 1937 petitioner also engaged in the activity of buying up mortgages on real properties at Miami Beach, Florida. By 1935 her general agent, Mr. Ross, had become registered with the Real Estate Board at Miami. He secured the services of a competent appraiser and they checked the ground value, current value, status of building permits, etc. of selected properties (R. 13, 18). The properties were then personally inspected by Ross and the appraiser and if found satisfactory the mortgages were purchased at a determined value (R. 13, 18). During the years 1935, 1936 and 1937, approximately $150,000 was expended by the petitioner in these selected mortgages (R. 17-18). Miami Beach, Florida, was chosen for the buying of the mortgages because it is the highest rated small city in

America for such investments (R. 18). Among the properties chosen at Miami Beach upon which mortgages were purchased by the petitioner upon selected real estate during 1935, 1936 and 1937 were the following: Hampton, Edward Fisher, Horning, E. L. Lockhart, Clark, Gerger, Sunset Island, Edward Holm, Cherry Lee Apartment Building and Hardiman (R. 18). In selecting the real property on each occasion Ross and the appraiser personally examined the properties thereunder, the abstract of title and determined the value (R. 18).

In connection with her real estate activities in New York, New Jersey and Florida, the petitioner, through her manager, Mr. Ross, employed accountants, realtors, lawyers and appraisers, paying them $9,700 in 1935 and $8,121 in 1936 for their services (R. 21-22).

In order to conduct the business of petitioner, Mr. Ross maintained an office at 1441 Broadway, New York City (R. 17). Mr. Ross also maintained an office in Miami, Florida, for the purpose of carrying on the petitioner's business there in real estate and investments (R. 9). The business was not that of Mr. Ross; it was the petitioner's business and her money was used in the business (R. 9).

It was stipulated between the parties at the hearing that the deduction of $25,000 (salary paid to Ross) here involved was allowed by the Commissioner of Internal Revenue in the previous years not at issue (R. 11).

Specification of Errors to be Urged.

The Court below erred:

1. In failing to reverse the decision of the Board of Tax Appeals on the ground that the Board had erred by disregarding competent, relevant and uncontradicted testimony, showing that the petitioner maintained business offices and was engaged in the business of buying, selling and managing real estate during the years involved.

2. In failing to find that during the years here involved the petitioner maintained business offices in New York City

and Miami, Florida; that she acquired control of and sold two substantial parcels of real property in New York City; that she purchased, sold and managed ten parcels of real estate in Eastern New Jersey; that during the period involved she bought and sold $275,000 worth of real estate in New York and New Jersey; that she engaged continuously in the appraising of real property and the buying of mortgages thereon at Miami Beach, Florida; and that these transactions constituted the carrying on of a real estate business within the meaning of Section 23(a) of the Revenue Acts of 1934 and 1936.

3. In failing to decide that the salary paid by petitioner to her general agent and the sums paid by her to accountants, realtors, lawyers and appraisers during the period involved constituted ordinary and necessary business expenses under Section 23(a) of the Revenue Acts of 1934 and 1936.

REASONS FOR GRANTING THE WRIT.

We believe that:

I.

The question here at issue involves important principles of Federal tax law. The case brings to this Court for the first time the question whether the management of one's own real property and the buying and selling of real estate constitutes the "carrying on of a business" within the meaning of Section 23(a) of the Revenue Acts. It also presents for decision the question of the extent of activity in the management of real property and the buying and selling thereof which is necessary to meet the test of "carrying on any trade or business" under Section 23(a) of the Revenue Acts.

In *Eugene Higgins* v. *Commissioner*, 312 U. S. 212, 61 S. Ct. 475, the Commissioner of Internal Revenue determined that insofar as Higgins was engaged in the management of his real estate, the taxpayer was carrying on a business

and the Board of Tax Appeals did not disturb this conclusion. That issue was not presented to the Circuit Court of Appeals or to this Court.

In a subsequent case, *Pinchot* v. *Commissioner* (C. C. A. 2), 113 F. (2d) 718, the Circuit Court of Appeals held that the management of real estate constituted a business, stating:

> "Our decision in Higgins v. Commissioner, 2 Cir. 111 F. (2d), did not touch the question of real estate management as a business."

In the case at bar the petitioner, during the years involved, acquired control of, managed and sold after long negotiation two substantial parcels of realty in New York City and the ten tracts of land located in Eastern New Jersey. In addition she engaged in the activity of buying mortgages on tracts of land and apartment houses at Miami Beach, Florida. (R. 14-18) She maintained an office at 1441 Broadway, New York City, from which the eastern transactions were carried on and another office at Miami Beach, Florida. (R. 17 and 9) Both the Board of Tax Appeals and the Circuit Court of Appeals failed to find these facts and disregarded them in their decisions.

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, this Court defined the term "business" as follows:

> "It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158 citing People ex rel. Hoyt v. Tax Comrs., 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit,' 1 Bouvier's Law Dict. p. 272."

This definition was quoted with approval in *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 515.

Recently the term "business" has been redefined by this Court to mean that for the purpose of Section 23(a) of the Revenue Acts there must be a "holding one's self out to

others as engaged in the selling of goods or services". *Deputy* v. *duPont*, 308 U. S. 488, 499.

To determine whether the activities of a taxpayer constitute the "carrying on of a business" requires an examination of the facts in each case. *Higgins* v. *Commissioner, supra; Deputy* v. *duPont, supra.* We think that the activities of Mrs. Ross in buying and selling real property and in maintaining offices from which the transactions were carried out meet the definitions of this Court by the term "business" in *Flint* v. *Stone Tracy Co., supra,* and *Deputy* v. *duPont, supra,* and that the Court below erred in disregarding these active business transactions. Here there was an offering of real estate for sale, an actual selling thereof and a holding out to others by means of offices and personal contacts that the real property was for sale (R. 14, 15, 16, 17). It is respectfully submitted that the question whether such real estate activities as those of this petitioner herein constitute a "business" is one which should now be settled by this Honorable Court. The question of security transactions was settled in *Higgins* v. *Commissioner, supra,* and *Deputy* v. *duPont, supra.*

II.

The Court below and the Board of Tax Appeals failed to find and disregarded uncontradicted evidence of petitioner's witnesses, showing that during the period involved she bought, sold, appraised and managed real property (R. 14, 15, 16, 17).

It was reversible error to so disregard the competent, relevant and uncontradicted evidence upon the vital issue in the case, viz., whether the petitioner actually bought, sold and managed real property. *Planters Operating Co.* v. *Commissioner*, 55 F. (2d) 583; *Belridge Oil Co.* v. *Commissioner* (C. C. A. 9), 85 F. (2d) 762; *Conrad & Co.* v. *Commissioner* (C. C. A. 1), 50 F. (2d) 576; *Bonwit Teller & Co.* v. *Commissioner* (C. C. A. 2), 53 F. (2d) 381; *Chicago Rwy. Equip. Co.* v. *Blair* (C. C. A. 7), 20 F. (2d) 10; *Dempster*

Mill Mfg. Co. v. *Burnet* (Ct. of App., D C), 46 F. (2d) 604.

The disregarding of petitioner's competent, relevant, positive and unrebutted testimony upon the pertinent issue in the case creates a conflict between the decision of the Court below and the decisions of other Circuit Courts of Appeal in the cases cited in the preceding paragraph.

III.

The decision of the Court below is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *Pinchot* v. *Commissioner, supra* (113 F. (2d) 718, 719). In that case the Court relied upon the definition of business by this Court in *Flint* v. *Stone Tracy Co., supra,* and held that the active management of one's own real estate was "carrying on business" within the meaning of the Revenue Acts. The Court said:

> "Our decision in Higgins v. Commissioner, 2 Cir. 111 F. (2d) 796, did not touch the question of real estate management as a business.

IV.

The decision of the Court below is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Cecil B. Highland, Executor,* 124 F. (2d) 556.

In that case the taxpayer, as executor and testamentary trustee of a substantial estate, deducted legal expenses arising out of actions to retain control or management of the estate. The Court held that the expenses were properly deductible, pointing out that the estate by virtue of its holdings in several real estate companies, was actively engaged in the real estate business. The estate held capital stock in several land companies and a majority of the Class "A" common stock in a company which published three newspapers. Here the petitioner actually bought, sold and managed the realty in question through her general agent. In fact, the Court below found that Ross looked after the tax-

payer's real estate and investments and was "a sort of general agent for her" (R. 28).

In the *Highland* case the Court stated in part as follows:

> " • • • 'Business' as first defined by the Supreme Court was said to embrace 'everything about which a person could be employed' and 'which occupies the time, attention and labor of men for the purpose of a livelihood or profit'. See Flint v. Stone Tracy Co., 220 U. S. 107, 171, quoted with approval in Von Baumbach v. Sargent Land Co., 242 U. S. 503, 515. More recently the term has been re-defined by that Court and narrowed so that 'carrying on any trade or business' is now said to mean a 'holding one's self out to others as engaged in the selling of goods or services.' See Deputy v. duPont, 308 U. S. 488, 499, quoted with approval in Helvering v. Wilmington Trust Co., 414 C. C. H. 1941 Fed. Tax Serv. § 9666 (3rd Cir.); cf. Higgins v. Commissioner, 312 U. S. 212. This interpretation means substantially that the deduction of expenses can be had only as against the business in which the individual is engaged. No case of private investment management can as a matter of law, constitute a business. But see H. R. 6175 (Bill introduced Dec. 4, 1941 by Congressman Disney, proposing a change in the existing law on this matter).
>
> "Even under this new spun definition of 'business', however, certain factors remain of lasting evidentiary importance. *For instance, the profit motive and presence of business-like policies should be given great weight.* E. g., Cecil v. Commissioner, 4th Cir. 100 F. (2d) 896; Whitney v. Commissioner, 3rd Cir. 73 F. (2d) 589; Commissioner v. Field, 2nd Cir., 67 F. (2d) 876; Doggett v. Burnett, App. D. C. 65 F. (2d) 191; Plant v. Walsh, 280 Fed. 722; cf. Chaloner v. Helvering, App. D. C., 69 F. (2d) 571; Union Trust Co. v. Commissioner, 6th Cir., 54 F. (2d) 199; Deering v. Blair, App. D. C. 23 F. (2d) 975; Thacher v. Lowe, 288 Fed. 994; see Deputy v. duPont, 308 U. S. 488, 500. *Similarly, the fact that a separate office is maintained is of evidentiary importance to suggest that the taxpayer is engaged in business.* See Foss v. Commis-

sioner, 1st Cir., 75 F. (2d) 326, 328; cf. Washburn v. Commissioner, 8th Cir., 51 F. (2d) 949." (Italics supplied)

In the case at bar the Court below ignored the profit motive in the petitioner's transactions and disregarded the fact that she maintained business offices (R. 17 and 9). Also when the two cases are compared, it appears that this petitioner stands in a much more favorable light than the estate in the *Highland* case. Here she carried on the transactions individually through her agent, whereas the estate held stock in the land companies involved.

V.

The Treasury Department now holds that an owner of real property is entitled to depreciation and expense deductions even though the operation of such property is not the taxpayer's principal business and has applied this ruling to cases where the taxpayer owns only a single parcel of realty. Bulletin F revised as of January, 1942, and published by the Treasury Department in connection with rates of depreciation states the following on page 85:

* * * * * * * * *

"The owner of real property rented for residential purposes is entitled to deductions for depreciation of the property even though the operation of such property is not his principal trade or business."

* * * * * * * * *

In *John D. Fackler* v. *Commissioner*, 45 B. T. A. 708, now pending before the Sixth Circuit on the taxpayer's appeal, the taxpayer owned a single lease for 99 years on certain land and a building thereon. He sublet the building to various tenants and in 1938 sold the lease at a gain, returning the profit on his 1938 income tax return as capital gain. The Commissioner of Internal Revenue determined that the lease constituted property used in a trade or business of a character subject to depreciation and expense deductions

and held that the lease was not a capital asset upon which the capital gain rates could be used in reporting profit from the sale. The Board of Tax Appeals, on November 14, 1941, affirmed the Commissioner's determination and held that the lease was property "used in trade or business" even though the taxpayer was a lawyer and owned only this one leasehold which he rented.

As has been shown hereinabove the petitioner acquired and sold numerous substantial tracts of realty in New York and New Jersey (R. 14-17). She held portions of the New Jersey land upon which income was received and purchased income producing mortgages in Florida. The Court below found as a fact (R. 28) that Ross, petitioner's general agent, looked after the petitioner's real estate and that he rented certain residences for the taxpayer (R. 29).

We think that the position of the Treasury Department and the Board of Tax Appeals is clearly inconsistent when the facts in this case are considered in the light of Treasury's Bulletin F and *John D. Fackler* v. *Commissioner, supra.* If a taxpayer who owns and rents but a single piece of realty is entitled to deductions on the theory that he is engaged in a realty business or that the property is used "in a trade or business," then it appears that Mrs. Ross, who acquired, sold and held realty on a substantial scale, is engaged in business and entitled to her expense deductions.

For the reasons above set forth, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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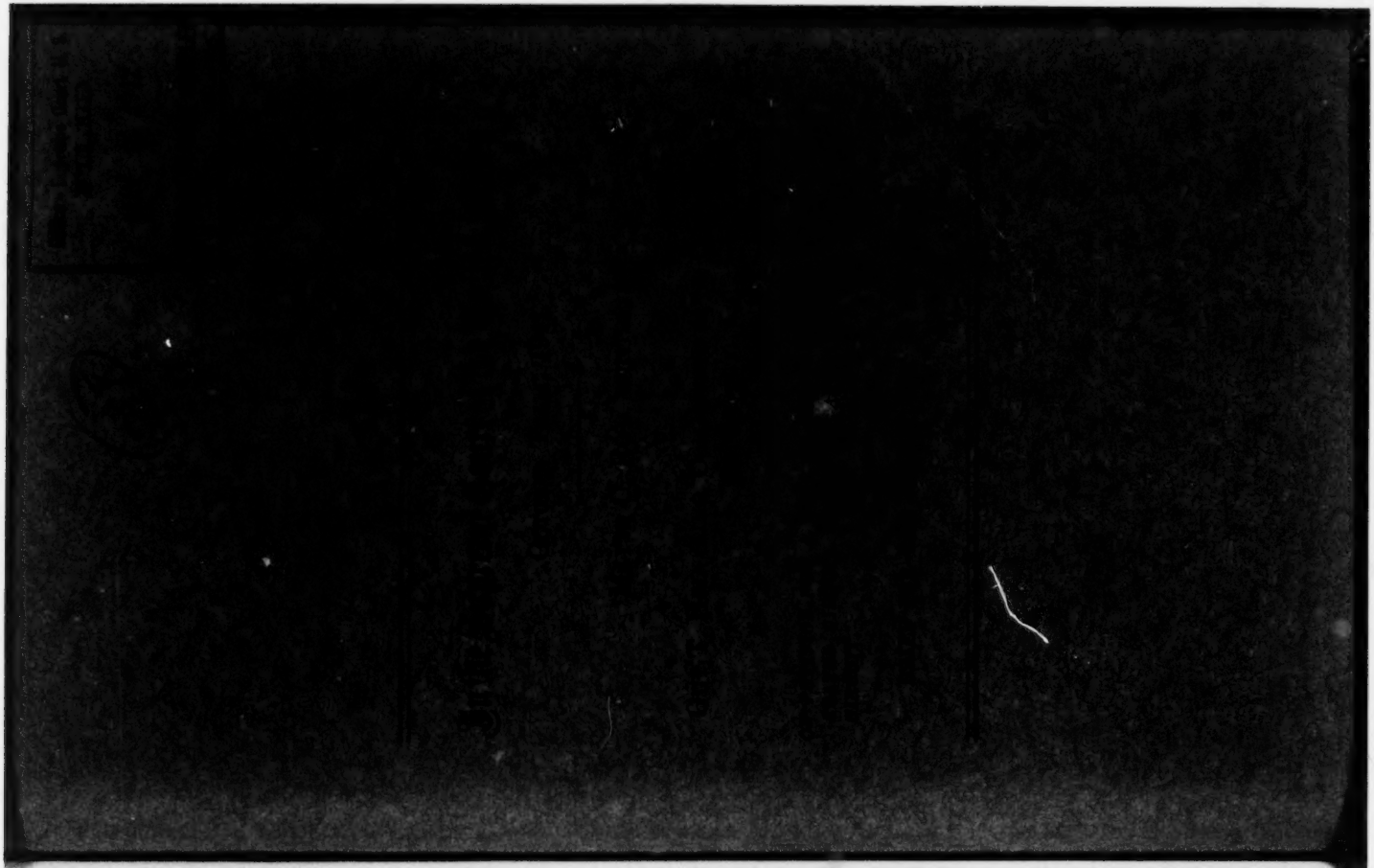

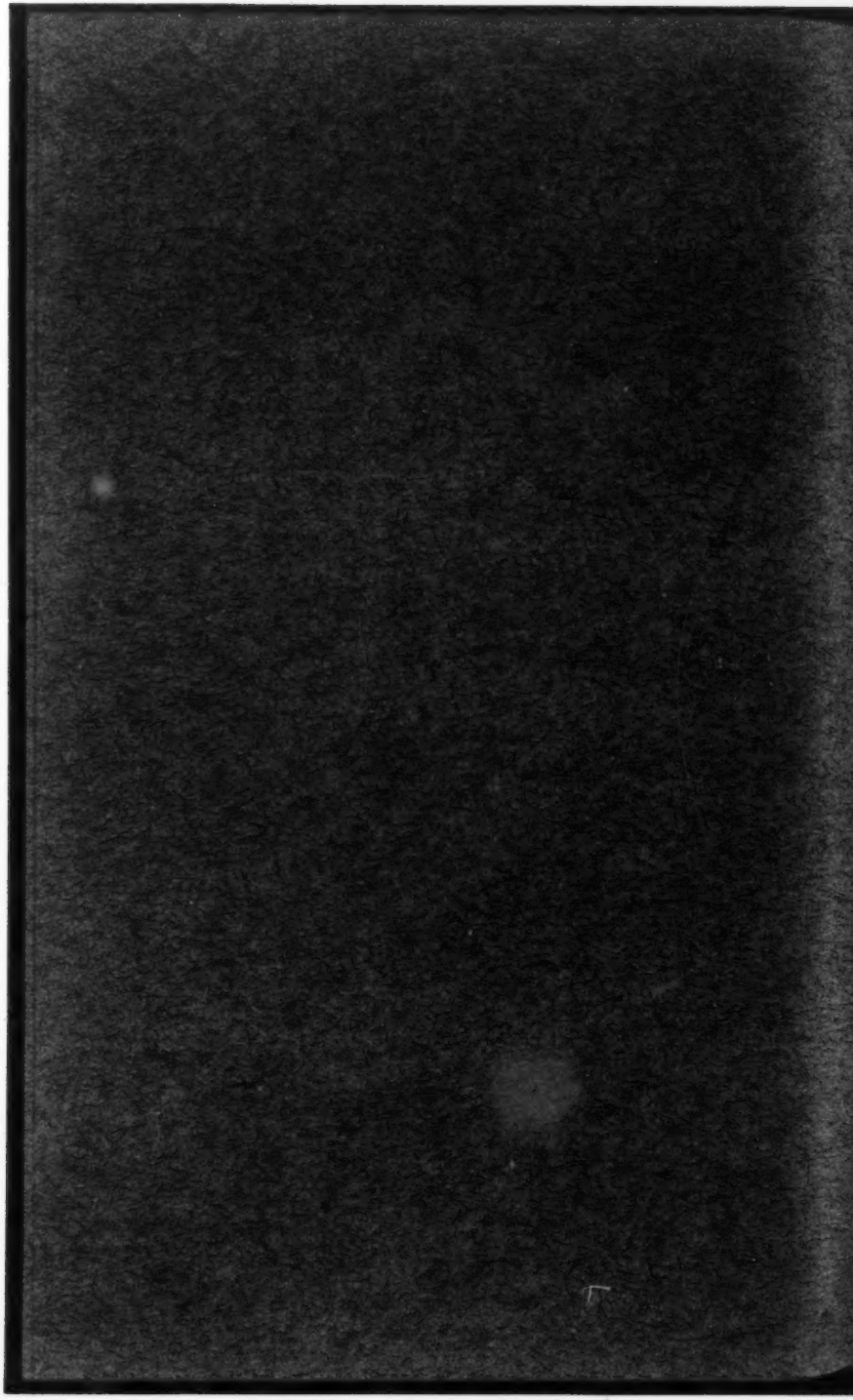

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1156

MAYTE C. ROSS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 1–5) is unreported. The opinion of the Circuit Court of Appeals (R. 27–29) is reported in 125 F. (2d) 767.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 23, 1942 (R. 30). The petition for a writ of certiorari was filed on April 17, 1942. The jurisdiction of this Court is in-

Products Company and one of the trustees of the $3,000,000 trust created by the taxpayer's first husband (R. 2, 3, 18–20). He also helped to dispose of her summer home in New Hampshire. This home was not acquired as business property nor had it been converted into such. It was used as a place of residence by the taxpayer during certain periods of the taxable years. Ross employed and conferred with various lawyers, real estate experts, accountants, and other persons (R. 4).

The taxpayer deducted in her returns for each of the years 1935, 1936, and 1937, the sum of $25,000 paid to her husband, and other sums, as business expenses incurred during those years. The Commissioner disallowed the claimed deductions on the ground that the taxpayer was not engaged in any trade or business during the taxable years and computed deficiencies accordingly (R. 1, 4). The Board found as facts that the taxpayer was not engaged in any trade or business during the taxable years; that the expenses claimed were all personal expenses, unallowable as deductions, and sustained the Commissioner's determination (R. 4–5). The Circuit Court of Appeals affirmed the decision of the Board (R. 30).

ARGUMENT

Petitioner contends that her activities constitute the management of real estate, and are, therefore, the carrying on of a trade or business within

the meaning of Section 23 (a). We think it clear, on the contrary, that petitioner's activities consisted solely of the management of personal investments, and that the case is governed by *Higgins* v. *Commissioner*, 312 U. S. 212, *City Bank Co.* v. *Helvering*, 313 U. S. 121, and *United States* v. *Pyne*, 313 U. S. 127.

Petitioner's activities, as conducted by her husband, consisted in the main of ousting the president of a business corporation in which she was financially interested (R. 18–20), in converting mortgage certificates which were regarded as bad investments into ordinary mortgages (R. 12–17), and in the purchasing of securities and other mortgages for investment (R. 17–18). Such activities are plainly the managing of investments, and not the carrying on of a real estate business.

Petitioner urges that her purchases and sales of property and mortgages show that she was engaged in business. But although such activities may be commercial, they may also be, as they were here, the mere conversion of personal investments from one type of property or security to another. *Higgins* v. *Commissioner, supra,* is directly in point, since the taxpayer's securities there too were also bought and sold.[1] In any event, the record does not show that petitioner purchased any real

[1] The *Higgins* case and *United States* v. *Pyne*, 313 U. S. 127, also show that the fact that petitioner may have maintained an office for the carrying on of her activities is immaterial.

Products Company and one of the trustees of the $3,000,000 trust created by the taxpayer's first husband (R. 2, 3, 18–20). He also helped to dispose of her summer home in New Hampshire. This home was not acquired as business property nor had it been converted into such. It was used as a place of residence by the taxpayer during certain periods of the taxable years. Ross employed and conferred with various lawyers, real estate experts, accountants, and other persons (R. 4).

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estate, and the only sales were of a residence and in the disposal of property secured by mortgage certificates.

The management of real estate, as appears from the *Higgins* case [2] and other cases cited by petitioner, consists of renting property and caring for it as a landlord, not merely the holding of mortgages as a personal investment. The record in this case plainly discloses that petitioner, through her husband, was engaged solely in the management of her investments.[3]

As petitioner herself testified (R. 8):

> During the years Mr. Ross has served me he has made all the investments. * * * So he became the investor, getting my money invested in mortgages and real estate and Mr. Ross attended to all the details, looking at every deed for me personally and investigating everything in which I invested and he bought some stocks. * * *

Mr. Ross, her husband, stated (R. 11, 23):

> * * * My occupation is portrait painter and since 1932 I have been an investor. I have no further occupations. * * *
>
> * * * * *

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[2] In the *Higgins* case it was conceded "that the real estate activities of the petitioner in *renting buildings* constituted a business." 312 U. S. 214. [Italics supplied.]

[3] The only property rented apparently was a personal residence in Florida in 1934, not one of the tax years involved in the present case (R. 9).

> I should say that in 1935, 1936 and 1937 Mrs. Ross was in the business of an investor—investments.

These accurate characterizations of petitioner's activities amply support the conclusion reached by the Board and the court below that petitioner's activities were governed by the cases holding that the managing of personal investments does not constitute the doing of business. Since petitioner is not engaged in the managing of real estate, there is no conflict with *Pinchot* v. *Commissioner,* 113 F. (2d) 718 (C. C. A. 2) or *Helvering* v. *Highland,* 124 F. (2d) 556 (C. C. A. 4). In the *Pinchot* case, for example, the taxpayer's activities consisted of the leasing and renting of property. The opinion states (p. 719):

> * * * What was done was more than the investment and re-investment of funds in real estate. It was the management of the real estate itself for profit. * * *

Petitioner has filed a motion praying for the deferment of action upon the petition for certiorari pending congressional action upon certain proposed legislation. At the present time it is entirely conjectural as to whether or in what form Congress will enact any such legislation, and whether it would in any event be applicable to the peculiar facts of this case.

CONCLUSION

This case presents no question calling for further review.

Respectfully submitted.

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OCTOBER TERM, 1941.

No. 1156.

MAYTE C. ROSS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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INTRODUCTION.

The respondent bases his opposition to the granting of the petition for certiorari in this case upon three propositions:

(1) That the record does not show that petitioner purchased any real estate, and the only sales of real estate by

petitioner were of a residence and property secured by mortgage certificates. (Br. p. 4-5.)

(2) That the phrase "management of real estate" means the renting of property and the caring for it as a landlord. (Br. 5.)

(3) That since the petitioner, under respondent's theory of the case, is not engaged in the managing of real estate there is no conflict with *Pinchot* v. *Commissioner*, 113 F. (2d) 718 (C. C. A. 2), or *Helvering* v. *Highland*, 124 F. (2d) 556 (C. C. A. 4). (Br. 7.)

The petitioner replies to these points as raised by the respondent as follows:

I.

We think that the record discloses that during the years here involved the petitioner did buy and sell for profit large tracts of real estate for a substantial consideration in each instance (R. 14, 15, 16 and 17). The tracts of land which the petitioner secured control of, purchased and sold, were as follows:

(a) Properties located on the west side of 178th Street, New York City (R. 14 and 15).

(b) 270 Convent Avenue, New York City (R. 16).

(c) Ten parcels of land located in Eastern New Jersey (R. 16).

In each of the above listed purchases and sales it became necessary for the petitioner to secure control of the property, foreclose the mortgages thereon, obtain title to the property and sell the same (R. 15 and 16).

With regard to the properties located on the west side of 178th Street, New York City, the petitioner's witness Ross testified as follows (R. 15):

"* * * We got control of the entire issue; we then proceeded to foreclose the mortgage. The mortgage

was foreclosed, title taken to the property, in the name of Mayte C. Ross. After title was taken to the property I then proceeded to secure a purchaser for the property which I finally succeeded in doing and the property was sold for $76,000. * * *"

With respect to the property located at 270 Convent Avenue, New York City, the witness Ross testified (R. 16):

"* * * After considerable pressure we did get control of the property. That was one large property located at 270 Convent Avenue, New York City. After we withdrew the property from a rehabilitator we next proceeded to find a buyer. We had two or three purchasers in mind. After weeks of negotiations, when Mr. Smith, one of the trustees, decided to cooperate and accept a bona fide, legitimate offer made and the property was finally liquidated. I think the correct amount was $155,000. * * *"

As to the ten parcels of land located in the eastern part of New Jersey, the witness Ross testified (R. 16):

"* * * This certificate covered about ten parcels altogether, located mainly in the eastern part of New Jersey. At first I communicated with Mr. Mosher, a very prominent real estate man in New Jersey and had a conference with him as to the best way to proceed to liquidate these properties. We discussed these various issues and decided upon a course of action. There were other certificates on a number of properties—I think two or three of them. We had full control. We had control of the $4,400 certificate. That was the Fred Eckes located at South Sumner Street, Bergen, New Jersey. We also had control of the Charles Kuhlmann, located at 215 45th Street, North Bergen, New Jersey. We also had control of $7,000, Messina, located at 10 Backman Place, Irvington, New Jersey. We liquidated about two-thirds of these properties. By that I mean we succeeded in turning them into cash either through sale of the property or sale of the certificate. We still have the other third which is slowly being paid off. * * *"

In order to carry out these transactions it was necessary to maintain an office at 1441 Broadway, New York City. The testimony of the witness Ross with respect to the office and the carrying on of the negotiations was as follows (R. 17):

> "During the period I have been testifying to, 1935, 1936 and 1937 I did maintain an office because I had been very active with all these situations which required meetings, it required conferences, it required hearing people, engaging experts, required the services of attorneys. I had my office at 1441 Broadway, New York. * * *"

It is respectfully submitted that the testimony of the witness Ross clearly shows that the petitioner did, during the years here involved, secure control of, buy and sell real estate; that an office was maintained for this purpose and that there was a holding out to others that petitioner was securing control of, buying and selling real property. These facts as developed by the record squarely present the question which we think should be settled by this Honorable Court, as set forth at page 7 of the petition for certiorari, as follows:

(1) Does the buying and selling of real property constitute the "carrying on of a business" within the meaning of Section 23(a) of the Revenue Acts?

(2) What extent of activity in the buying and selling and management of real property is necessary to meet the test of "carrying on any trade or business" under said Section 23(a)?

It is respectfully urged that these questions are properly before the Court for decision under Mr. Justice Frankfurter's definition of the term "trade or business" in *Deputy v. du Pont*, 308 U. S. 488, as follows:

> "What the activities of a taxpayer are is an issue for determination by triers of fact. Whether such activities constitute a 'trade or business' as conceived by

§ 23(a), is open for determination here *unfettered by findings and rulings below* except for the weight of the intrinsic authority of all lower court opinions. To avail of the deductions allowed by § 23(a), it is not enough to incur expenses in the active concern over one's own financial interest. '* * * carrying on any trade or business', within the contemplation of § 23(a) involves holding one's self out to others as engaged in the selling of goods or services." (Italics supplied.)

II.

It appears that the respondent's theory is that the management of real estate should be interpreted as consisting of renting property and caring for it as a landlord (Br. 6) rather than the buying and selling thereof for profit. In its published bulletin the Treasury Department has determined that the owner of realty rented for residential purposes is entitled to depreciation deductions even though the operation of such property is not the principal trade or business of the taxpayer (Bulletin F, revised as of January, 1932 and published by the Treasury Department in connection with rates of depreciation, page 85).

Please see also *John D. Fackler* v. *Commissioner*, 45 B. T. A. 708 in which a similar determination by the Treasury Department was upheld by the United States Board of Tax Appeals.

We think that the respondent's interpretation of the term "management of real estate or real estate business" is too narrow and that if a person who merely owns a building and collects rent therefrom is to be regarded as engaged in the "real estate business" then certainly one who buys and sells real estate for profit must also be held to be engaged in the real estate business. The instant case is illustrative of the point. Here Mrs. Ross maintained an office and bought and sold real estate and secured control thereof on a substantial scale, employing realtors, accountants and lawyers in connection with her transactions. Is she to be denied the deduction of her expenses in connection with these transactions on the theory that she is not engaged in business whereas one

who merely rents a building is regarded as being engaged in business and entitled to deduct expenses and depreciation?

III.

We think that the decision of the Courts in *Helvering* v. *Cecil B. Highland, Executor*, 124 F. (2d) 556 (C. C. A. 4) and *Pinchot* v. *Commissioner*, 113 F. (2d) 718 (C. C. A. 2) sustain the position of the petitioner in this case and that, as pointed out in the petition for certiorari, there is a conflict between the decisions of the Courts in the foregoing cases and the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar.

In *Pinchot* v. *Commissioner*, *supra*, the Court held that the management of one's own real estate constituted the "carrying on of a business". We believe that the record in the instant case sustains the petitioner's position that she managed her real estate holdings in New York and New Jersey and also that during the years in question the petitioner actually secured control of the properties in New York and New Jersey, obtained title to them and sold them at a profit. We think that these transactions constituted a carrying on of a real estate business under the decision of the Courts of Appeal in *Pinchot* v. *Commissioner*, *supra*, and *Highland* v. *Commissioner*, *supra*. The petitioner did not merely keep records with respect to her securities and collect dividends and interest thereon as in *Higgins* v. *Commissioner*, 312 U. S. 212. She vigorously carried on the buying and selling of real property for a profit. Furthermore the petitioner was active in her transactions, not a mere passive investor. As pointed out in respondent's brief (page 5), she ousted the president of a business corporation (R. 18 and 20), thus increasing her income and in addition carried on the extensive transactions discussed hereinabove as well as the mortgage transactions in Florida referred to at pages 5 and 6 of the petition for certiorari. We think it immaterial that at the outset of her transactions she possessed merely mortgage certificates. The record shows that she secured

control of and purchased the properties underlying these certificates and then actually sold these real properties for profit.

CONCLUSION.

For the reasons set forth in the petition for certiorari and as above set forth, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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